

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LARRY GARDNER,

Defendant and Appellant.

2d Crim. No. B217376
(Super. Ct. Nos. 2008017794, 2004023738)
(Ventura County)

David Larry Gardner appeals a judgment (Case No. 2008017794) after his conviction of three counts of possession of deadly weapons (Pen. Code, § 12020, subd. (a)(1)), possession of ammunition by a person prohibited from possessing a firearm (§ 12316, subd. (b)(1)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). In Case No. 2004023738, Gardner, represented by counsel and pursuant to a plea agreement, pled guilty to 40 counts, including, among other things, arson, criminal threats, grand theft, forgery, computer fraud, filing a false tax return and three counts of solicitation of murder. He agreed to a prison sentence of 33 years and he waived his right to appeal.

In Case No. 2008017794, which concerns this appeal, Gardner was sentenced to a prison sentence of 12 years to be served concurrently. We conclude that the trial court did not commit reversible error in admitting the covers of six pornographic

magazines the police seized during a search of a storage unit that Gardner rented. We affirm.

FACTS

On December 1, 2003, Gardner leased storage unit No. 505 at Oak View Self Storage (OVSS). His storage tenancy lasted until July 1, 2004, when Sara McColloch, Gardner's step-daughter, entered into a lease for that unit.

On June 22, 2004, Sheriff's Detective Gary Hess searched Gardner's home pursuant to a search warrant and found receipts indicating that Gardner had leased a storage unit at OVSS. Hess obtained a search warrant for unit No. 505. When he entered that unit, he found weapons, including "cane swords" and "shurikens or throwing stars." The throwing stars and cane swords are illegal weapons. Hess found a plastic tub "filled with ammunition."

In his search of the storage unit, Hess found two boxes, an IBM box and a brown paper box. In the IBM box, he found a printout of an e-mail sent to Gardner's e-mail address regarding a leather holster for a Smith and Wesson 500 gun. There was a "Beam Shot 3000 Gun Laser Sight."

In the brown paper box, Hess found weapons publications, including a "Delta Force Shooting Sport Catalog," a "Delta Press Weapons Catalog," and a "Fire Quest Catalog." There was a catalog "pertaining to sexual products" from a "Holiday Products" company and an envelope from Holiday Products addressed to Gardner. That envelope was admitted at trial as part of the People's exhibit 19, which also included a shipping receipt from Bon-Vue Enterprises that listed several pornographic magazines including Fundgeon Times and Komic Fantasies. The People's exhibit 19 also contained the front covers of six pornographic magazines. The adult pornographic magazines entitled Best of Family Touch and Bondage Slaves were found in the IBM box. Other adult pornographic magazines entitled Fundgeon Times, Komic Fantasies and two editions of Perils of Penelope were in the brown box.

On August 30, 2005, Deputy Sheriff Larry Bull conducted a search of Gardner's home pursuant to a search warrant. In a gun safe, he found rifles, shotguns,

hand guns and ammunition. The items seized included a .50 caliber rifle, a .50 caliber revolver (Smith and Wesson 500), and .50 caliber ammunition.

John Scholfield testified that he entered into a business relationship with Gardner. Gardner leased space to third parties to board horses on Scholfield's property. The horse owners paid Gardner rent, and he paid Scholfield a fee. Scholfield said Gardner told him that he possessed a variety of weapons, including "throwing stars" and Japanese swords. Gardner also said he was storing weapons. Scholfield remembered Gardner telling him "about guns being in a storage locker in Oak View."

Leslie Gardner, Gardner's brother, testified that he saw his brother in possession of a .50 caliber rifle and a .50 caliber revolver. Deputy Bull later seized these weapons in the search of Gardner's home. Leslie Gardner identified them at trial.

Alice Gardner, Gardner's sister-in-law, testified that she also saw her brother-in-law with a Smith and Wesson 500 revolver. She identified this weapon at trial.

Pretrial Hearing on the Admissibility of the Six Pornographic Magazine Covers

The trial court held an Evidence Code 402 hearing to determine the admissibility of the People's exhibit 19. It included the covers of six pornographic magazines which were found in the boxes searched in storage unit No. 505.

At the hearing Gardner's counsel said the pornography was relevant, but it was unduly prejudicial. He noted that one of the magazine covers "ostensibly discusses incest." The trial court overruled the defense Evidence Code section 352 objections. It said, "I think that they are not more prejudicial than they are probative."

DISCUSSION

Admitting the Pornographic Magazine Covers

Gardner contends the trial court committed reversible error by admitting the six pornographic magazine covers. We disagree.

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) "The court in its discretion may exclude evidence if its probative value is

substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice" (Evid. Code, § 352.)

"[T]he propriety or impropriety of admitting evidence of a defendant's pornography will vary from case to case depending upon the facts" (*People v. Page* (2008) 44 Cal.4th 1, 41, fn. 17.) Sexual "images possessed by a defendant" have been held to be admissible to prove material issues, such as a defendant's intent. (*Id.* at p. 40.) Trial courts must "exercise caution in weighing the probative value of individual examples of pornography possessed or accessed by a defendant." (*Id.* at p. 41, fn. 17.)

Here the trial court weighed the probative value of this evidence against the possibility of prejudice. It said, "I think that the 352 analysis, although somewhat close, comes down against Mr. Gardner." The court was aware that jurors could view this material to be offensive. But it also recognized the importance of this evidence on the issue of the identity of the person who possessed the storage unit and the weapons. It said Gardner was not "agreeing in this trial that the things in the storage locker belong to him. The People have to prove whether they did belong to him. This material goes a long way towards doing that." It found that the location of the magazines "in such close proximity to gun-related publications" and the weapons "lends itself to the inference that the things all belonged to him and not to someone else."

But the trial court also was aware of the need to take steps to prevent jurors from being distracted by this material. It said it would "give any limiting instruction that the defendant requests that is reasonable to make sure that the jurors only use it for a proper purpose."

Gardner contends the admission of this evidence was unnecessary because, before trial, Gardner's counsel offered to stipulate that Gardner had access to the storage unit. But the issue was who had possession of the weapons and ammunition in that building. At trial, Gardner's position was that his step-daughter, Sara McColloch, owned the weapons and that Gardner had merely rented the storage unit for her use. The trial court saw a link between the pornography and Gardner's possession of the weapons. It could reasonably infer that storing the pornography in the storage unit showed Gardner's

exclusive possession of that area. It could draw the inference that he would not have stored these magazines, which were so offensive to women, in the storage unit if he was sharing that facility with his step-daughter. Consequently, a trier of fact could reasonably infer that he exclusively possessed the unit that contained the weapons and the ammunition seized by the police.

Gardner suggests that the admission of prosecution exhibit 19 was so offensive that he could not receive a fair trial. But this exhibit contained only the front covers of the six magazines, not the interior content. Four of the magazines were adult sexual comic books with cartoon or illustrated covers and titles such as *Bondage Slaves*, *Komic Fantasies* and *Perils of Penelope*. The *Bondage Slaves* cover involved an exaggerated comic illustration of two women tied together with chains. The *Komic Fantasies* cover is a comic illustration of one naked woman slapping the buttocks of another naked woman. The two *Perils of Penelope* covers involve more realistic drawings of women being tied or chained and a drawing of a dominatrix in the background holding a whip. As the Attorney General notes, although these four covers "involved themes of bondage," there was "no suggestion that possession of those magazines was illegal." They did not involve child pornography and none of these four covers contained any pictures of real women.

The two remaining magazine covers, *Best of Family Touch* and *Fundgeon Times*, contained photographs of real women. The cover of the *Best of Family Touch* magazine has a photograph of a naked woman and a caption "Hidden Acts of Forbidden Love Revealed!" Gardner claims this cover suggests that this magazine is about incest. The cover of the *Fundgeon Times* magazine contains a photograph of a naked woman whose hands are tied to her ankles. Gardner notes that she has "a ball gag in her mouth." There is also a photograph of another woman whose breasts are tied by straps. There appears to be a person behind her giving the apparent suggestion that she is being held. Of all the magazine covers, this was the most graphic and arguably the most offensive. The photographs show real women posing in sexual bondage positions.

The Fundgeon Times magazine was listed on a shipping statement sent to Gardner. This was evidence proving that the various pornographic magazines in exhibit 19, which were in the storage unit, belonged to him, and not his step-daughter. The Attorney General suggests that the magazine covers provided an evidentiary link to Gardner, the shipping list, the weapons magazines and to the weapons and ammunition seized in the search.

Gardner argues that the trial court at least should have attempted to "sanitize" this evidence. We agree. The same result could have been achieved by permitting the magazine covers to be admitted and redacting the sexual bondage photographs. That would have eliminated the most offensive sexually explicit material, and still allowed the prosecution to make its evidentiary link. Jurors reviewing the cover without the photographs could still draw the inference that this was the type of sexual material a defendant would want to hide from others in a safe area, such as a storage unit used exclusively by that defendant.

Even where a trial court errs by admitting sexually explicit pictures, the defendant is not entitled to a reversal unless he can "establish that the admission of the magazines was prejudicial error." (*People v. Page, supra*, 44 Cal.4th at p. 41.) Gardner has not made that showing.

The evidence against him was compelling. Gardner leased the storage unit where the weapons were found, and other weapons were found in his home. Gardner's brother testified that he saw Gardner in possession of a .50 caliber rifle and a .50 caliber revolver, the same weapons Deputy Bull later seized in the search of Gardner's home. Garner's sister-in-law also saw him in possession of the Smith and Wesson 500 revolver. Garner told Scholfield that he possessed a variety of weapons, including "throwing stars," that he was storing weapons, and he informed Scholfield about the storage locker in Oak View. When the police searched Gardner's home, they found "throwing stars"; when they searched the storage unit, they found these same type of weapons. One item seized in one of the searches was a printout of an e-mail sent to Gardner documenting his purchase of a holster for a Smith and Wesson 500 firearm. Another item was a ledger

containing Gardner's handwriting, which documented his purchase of .50 caliber ammunition. There were documents from Henderson Wood Floors in one of the boxes Hess searched. Gardner had worked for that company.

We have reviewed Gardner's remaining contentions and conclude that he has not shown error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James P. Cloninger, Judge
Superior Court County of Ventura

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steve E. Mercer, Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.